



SHOULD I STAY OR SHOULD I GO?

Lolita Buckner Inniss

AS THE DEAN OF A United States law school, I have had a front row seat, if not an active role, in the drama that has unfolded as law schools began defecting from participation in the *U.S. News and World Report* Survey of Law Schools in fall and winter 2022. This survey helped to support the publication of a ranking that has, for over three decades, held law schools (and schools and colleges in other disciplines) in thrall to a system over which they have had little control. The survey has come to have increasing weight as a tool for assessing the quality of academic institutions.¹

This overarching power has caused law school administrators and faculty members to rail against the flaws in the process and decry the way in which the rankings have created a hierarchy that, in many cases, fails to

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The title and section headings of this article are drawn from the classic song "Should I Stay or Should I Go?" by The Clash. COMBAT ROCK (CBS-Epic 1982).

¹ As one observer writes, "[Law school applicants, law review editors, alumni, and many more people rely on *US News's* law school rankings to evaluate law schools." Andrew P. Morriss, *Legal Education Through the Blurry Lens of US News Law School Rankings*, 20 GREEN BAG 2d 253, 253 (2017).

fully or accurately assess the nature and quality of schools. Years of complaints came to a seemingly sudden boilover in November 2022 when enduringly first-ranked Yale Law School announced that they would no longer provide data to *U.S. News* to help it prepare its assessment.² Soon to follow were several other schools, most of them also holding high places in the rankings, including Harvard, Stanford, Columbia, Berkeley, Northwestern, and UCLA. Some other schools falling in lower positions in the rankings also opted out.³

U.S. News has asserted that it will continue to rank schools that decline to participate in its process, using publicly available data. But the publisher will, apparently, provide more detailed profiles of responding schools, a possible incentive for lower-ranked institutions without as many independent means of attracting attention to continue to provide data.

Critics have frequently pointed out that the *U.S. News* rankings are the remnants of what used to be a broad-based and respected general news magazine, and have argued that the rankings, like the journal, are now obsolete. The growing backlash against the rankings reflects the concerns of law schools about the ways that the rankings skew student admissions, faculty hiring, and school spending, among other things. The rankings have traditionally emphasized factors like test scores and undergraduate grade point averages of enrolled students, thereby deterring schools from admitting promising students who lack traditional markers of excellence. The fact that the rankings have these effects calls into question the very ethics, fairness, and purpose of a legal education, as well as the integrity of institutions that provide such learning.

² Dean Gerken: *Why Yale Law School Is Leaving the U.S. News & World Report Rankings*, law.yale.edu/yls-today/news/dean-gerken-why-yale-law-school-leaving-us-news-world-report-rankings (Noting that the rankings “are profoundly flawed – they disincentivize programs that support public interest careers, champion need-based aid, and welcome working-class students into the profession” and that Yale Law has “reached a point where the rankings process is undermining the core commitments of the legal profession.”).

³ For instance, the University of San Francisco and the University of Idaho have withdrawn. So, too, has unranked California Western School of Law. Paul Caron, *With UC-SF, St. John’s, And Idaho: 23 Schools Are Now Boycotting The U.S. News Law School Rankings*, TaxProf Blog (Jan. 7, 2023), taxprof.typepad.com/taxprof_blog/2023/01/with-uc-sf-st-johns-and-idaho-23-schools-are-now-boycotting-the-us-news-law-school-rankings.html.

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*It's always tease, tease, tease
You're happy when I'm on my knees⁴*

Whether or not the *U.S. News* list, published annually since 1987, is out of touch or out of date, it has remained influential. Law schools, even those with little reason for doing so, hold onto the hope, year after year, that they will rise in the rankings. Roughly the same dozen-plus law schools have held the top spots for 30 years, shifting position only slightly. But changes do happen. Such changes, mostly small but occasionally quite large, have kept law schools cynically loyal and wedded to an arcane and hermetic process that has become even more opaque over the years.

So what about those schools who refuse to participate any longer – or as some have described them, the boycotters?⁵ Once Yale Law made its departure announcement, many schools traditionally at the very top of the rankings – the (in)famous T14 – quickly followed suit.⁶ One wonders if this is what it felt like in 1861 when states began withdrawing from the Union in the run-up to the U.S. Civil War.⁷ This analogy plays on extreme hyperbole, of course – *U.S. News* survey departures present no incipient constitutional crisis nor any threat of actual war. This is, however, an exaggeration bearing enough similarity to make the overstatement meaningful. The question of whether to stay or go has created both an existential and epistemic if not a constitutional crisis in legal education, potentially sundering what had been a uniform, even if grudging, acceptance of the rankings' role in shaping why we exist, and how we know what we are. And there is most definitely a war afoot – the goers have thrown down the

⁴ THE CLASH, *Should I Stay or Should I Go?*, COMBAT ROCK (CBS-Epic 1982).

⁵ Ruth Graham, *After Law Schools Boycott, U.S. News Will Change Its Influential Ranking System*, N.Y. TIMES, Jan. 3, 2023, Section A, page 13.

⁶ Id.

⁷ The South Carolina legislature mounted a state convention upon the election of President Abraham Lincoln in 1860, where the state's delegates voted to remove South Carolina from the United States. This secession triggered the departure of several more states – Mississippi, Florida, Alabama, Georgia, Louisiana, Texas, Virginia, Arkansas, Tennessee, and North Carolina. These eleven states eventually formed the Confederate States of America. See *Civil War Glass Negatives and Related Prints: Timeline*, Library of Congress, www.loc.gov/collections/civil-war-glass-negatives/articles-and-essays/time-line-of-the-civil-war/1861/.

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gauntlet and declared battle against the existing, and prevalent, law school sorting mechanism.

Where the metaphor comparing state secession with departure from the *U.S. News* rankings seems to break down is that the generally accepted narrative about state secession is that those states who left, the goers in that context, did so for immoral reasons – slavery (but see the “states’ rights” claims) – and in doing so undermined a legitimate nation state. This made the goers unethical “bad guys” while the stayers, those who supported the Union, were the principled “good guys.” The judgment of history accepts this assignment of bad-guy/good-guy status in the context of U.S. state secession. In contrast, the goers in the case of *U.S. News* rankings have, for the most part, been framed as heroic, bold, autonomy-embracing, and, by implication, good guys.

*If I go, there will be trouble
And if I stay it will be double*⁸

Not much is being said about *U.S. News* stayers. This silence makes us . . . sort of like bad guys (or fall guys) who await further harm from our inclusion in the rankings. I am here to say it ain’t necessarily so. Schools who stay in and schools who go from the *U.S. News* rankings may both be exercising legitimate, potentially constructive, liberating, and possibly even subversive agency, albeit via different models. Models of agency are cultural frameworks that offer ideas about how to understand participant actions.⁹ Generally speaking, normatively “good” actions in U.S. culture are self-focused, inside facing, proactive, individualized, and controlling.¹⁰ These are called *disjoint models of agency*.¹¹ In contrast, actions that consider something beyond the self, or that seek not to control events but rather to weather the tide, or that seek incremental, collective

⁸ The Clash, *supra* n.4.

⁹ Hazel Rose Marcus and Shinobu Kitayama, *Models of Agency: Sociocultural Diversity in the Construction of Action*, in Virginia Murphy-Berman & John J. Berman (Eds.), *CROSS-CULTURAL DIFFERENCES IN PERSPECTIVES ON THE SELF 2*, 7 (2003).

¹⁰ *Id.*

¹¹ *Id.*

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change – especially while remaining subject to a particular peril – are considered *conjoint* models of agency.¹² While not “bad” per se, conjoint models have often been described as less desirable approaches to difficult situations, especially those that present serious difficulty and seemingly binary choices. One example is the choice of whether to evacuate in the face of a disaster. Some scholars have considered, for instance, whether those who chose not to evacuate during Hurricane Katrina in 2005 were exercising “bad” choices via conjoint agency as opposed to the “good” disjoint choice to depart.¹³ Another example, here at hand, is whether to withdraw in the face of the implosion of *U.S. News* rankings.

Observers often describe goers as demonstrating attributes of the disjoint agency model: they are positive embodiments of leaders – confident, in control, and agentic. In contrast, stayers – those modeling conjoint agency – are negative figures lacking ambition, agency, or self-motivation. There are, however, many ways to move through the world, and staying put, even if only long enough to see the way the wind is blowing and the lay of the land, may be prudent and prescient.¹⁴ It is possible to choose a less immediately proactive approach, such as staying, in order to achieve a broader goal, such as change to an entire enterprise.

*Exactly whom I'm supposed to be
Don't you know which clothes even fit me?*¹⁵

In response to the departures, *U.S. News* has suggested that it will offer a more nuanced, potentially more participant-friendly method of analysis that eliminates some factors that were previously assessed. At the same time, however, *U.S. News* doesn't quite say what weights it will assign to factors it does retain. Staying and fully participating in the rankings process may be good for schools – or not. But getting out of the *U.S. News* rankings

¹² Id.

¹³ Nicole M. Stephens et al., *Why Did They “Choose” to Stay?: Perspectives of Hurricane Katrina Observers and Survivors*, 20 *PSYCHOLOGICAL SCIENCE* 878, 879 (2009) (noting that many of the negative responses to those who chose not to evacuate were grounded in the disjoint model of agency).

¹⁴ Id. at 884 (suggesting that stayers, in exercising conjoint agency, not only adjusted themselves to their constraints, but also may have developed compensatory secondary control).

¹⁵ THE CLASH, *supra* n.4.

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early, or getting out at all, may not be all that meaningful in a larger sense either.

Not all examples of agency and autonomy are freeing – too often, entrenched hierarchies and structures of power follow participants even upon their departure from certain situations, leaving them with what has been described as non-liberatory agency.¹⁶ Agency, is, after all, the freedom to do or not do. And in either case, agency is not necessarily resistance. Sometimes trouble has a way of finding the goers as much or more as it does the stayers.



¹⁶ Saba Mahmood, *Feminist Theory, Agency, and the Liberatory Subject: Some Reflections on the Islamic Revival in Egypt*, 2 TEMENOS 31, 33-34 (2006).